SUPREME COURT, U.S.

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No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

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BRIEF FOR APPELLANT

BYRD, DAVIS, EISENBERG & CLARK
DON L. DAVIS
TOM H. DAVIS
214 Austin National Bank Bldg.
Austin, Texas 78701

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTION PRESENTED	3
STATEMENT	3
ARGUMENT	5
I. APPELLANT'S CONVICTION FOR PUBLIC INTOXICATION IS UNCONSTITUTIONAL	5
A. HISTORICAL BACKGROUND	6
B. THE EIGHTH AMENDMENT STANDARDS	12
C. THE *DRIVER* AND *EASTER* CASES	16
II. APPELLANT'S CONVICTION FOR EXHIBITING A SYMPTOM OF HIS DISEASE IS UNCONSTITUTIONAL	22
CONCLUSION	30

CITATIONS

Page

CASES:

Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) 16, 17, 18, 22, 24, 25, 28

Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) 17, 18, 21, 27

Ex Parte Pickens, 101 F.Supp. 285 (D.C. Ala. 1951) 15

Francis v. Resweber, 329 U.S. 459 (1947) 15

Gallego v. United States, 276 F.2d 914 (9th Cir. 1960) 14

Hayes v. United States, 112 F.2d 417 (10th Cir. 1940) 14

In re Kemmler, 136 U.S. 436 (1890) 12, 14

Jackson v. United States, 102 Fed. 473 (9th Cir. 1900) 14

Largent v. Texas, 318 U.S. 418 (1943) 2

O'Neil v. Vermont, 144 U.S. 323 (1892) 14

Robinson v. California, 370 U.S. 660 (1962) 2, 15, 17, 18, 22, 23, 24, 26, 28

Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965) 25, 26

Trop v. Dulles, 356 U.S. 86 (1958) 13

Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946) 15

Weems v. United States, 217 U.S. 349 (1910) 12, 14

Wilkerson v. Utah, 99 U.S. 130 (1879) 12

CONSTITUTION:

Eighth Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution 2

STATUTES:

Cal. Pen Code §§ 647, 19 7

Page

D.C. Code Ann. § 24-501 (1961) 9
D.C. Code Ann. § 24-502 (1961) 11, 18
D.C. Code Ann. § 25-128(a) (1961) 7
Eng. Intox. Stat., 4 Jac. 1, c.5 (1606) 7
Mich. Stat. Ann. § 28.365 (1962) 7
N.C. Gen. Stat. §§ 14-335 (12) (Supp, 1965) 7
Vernon's Texas Civil Statutes, Art. 5561c § 1 (1953) 9
Vernon's Texas Civil Statutes, Art. 5561c § 3(c) (1953) .. 11
Vernon's Penal Code, Art. 36 (1939) 26
Vernon's Penal Code, Art. 477 (1925) 2, 3, 6, 22, 24
Wisc. Stat. Ann. § 947.03 (1958) 7

LAW REVIEWS AND JOURNALS:

Cellini, *Cruel and Unusual Punishment—Alcoholism as a Defense to a Charge of Public Intoxication*, 41 Tulane L. Rev. 140 (1966) 16

Holmes, *The Path of the Law*, 10 Harv. L.Rev. 457 (1897) 30

Judice, *Public Intoxication*, 30 Texas Bar J. 341 (1967) .. 16

Murtagh, *Arrests for Public Intoxication*, 35 Fordham L. Rev. 1 (1966) 16, 29

New York State Bar Ass'n. Committee on Public Health, *Report on Alcoholism* (Dec. 31, 1966) 16

Note, *Alcoholism, Public Intoxication and the Law*, 2 Colum. J. of L. & Soc. Prob. 109 (1966) 16

Comment, 4 Houston L. Rev. 276 (1966) 16

Comment, 18 S.C. L. Rev. 504 (1966) 16

Note, 1966 Duke L. J. 545 (1966) 16

Note, 12 Wayne L. Rev. 879 (1966) 16

Note, 52 Cornell L. Q. 470 (1967) 16

Note, 27 La. L. Rev. 340 (1967) 16

8 Ariz. L. Rev. 351 (1967) 16

Page

33 Brooklyn L. Rev. 324 (1967) 16
13 Howard L. J. 203 (1967) 16
12 S. Dak. L. Rev. 142 (1967) 16
19 Ala L. Rev. 183 (1966) 16
46 B. U. L. Rev. 409 (1966) 16
15 Catholic U. L. Rev. 259 (1966) 16
54 Geo. L. J. 1422 (1966) 16
55 Ky. L. J. 201 (1966) 16
44 N.C. L. Rev. 818 (1966) 16
3 Tulsa L. J. 175 (1966) 16
11 Vill. L. Rev. 861 (1966) 16
23 Wash. & Lee L. Rev. 402 (1966) 16
7 Wm. & Mary L. Rev. 394 (1966) 16
2 Ga. St. Bar J. 239 (1965) 16

TEXTS AND PERIODICALS

A.M.A., *Today's Health Guide* 459 (1965) 10
Bible 6
Block, Alcoholism: Its Facets and Phases 60 (1965) 22
2 Cecil and Loeb, a Textook of Medicine (10th ed. 1959) 9
Donnelly, Goldstein & Schwartz, Criminal Law (1962) 14
Guttmacher and Weihofen, Psychiatry and the Law (1952 ed.) 9, 19
Haggard & Jellinek, Alcohol Explored (1954) 8
Hospitalization of Patients with Alcoholism, 762 A.M.A.J. 750 (Oct. 20, 1956) 9
Jellinek, The Disease Concept of Alcoholism (1960) 9
Jellinek, Phases of Alcohol Addiction, in Society, Culture and Drinking Patterns (1962) 11
Krout, The Origins of Prohibition (1925) 8

Page

Lipscomb, *Epidemis Logical Methods in the Study of Alcoholism*, 49 Amer. J. of Public Health 327 (1959) . . 8

MacCormick, Correctional Views on Alcohol, Alcoholism, and Crime, 9 Crime & Delinquency 15 (1963) 21

Trotter, *An Essay, Medical, Philosophical and Clinical on Drunkenness* (2d ed. 1804) 8

Ullman, To Know the Difference (1960) 8

REPORTS:

National Institute of Mental Health, United States Depart. of Health, Education and Welfare, *Alcoholism*, Public Health Service Pub. No. 730 (1963) 10

Pittman & Gordon, Revolving Door: A Study of the Chronic Police Case Inebriate (1958) 7

President's Commission on Crime in the District of Columbia, Report (1967) [cited as *D. C. Crime Commission Report*] 20, 21

President's Commission on Law Enforcement and Administration of Justice, Report (1967) [cited as *U. S. Crime Commission Report*] 20

Rehabilitation of Alcoholics, 93 Cong. Rec. 3357 (1947) 7

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BRIEF FOR APPELLANT

OPINIONS BELOW

There was no formal opinion of the County Court at Law. The oral decision is printed in the Appendix at page 46. The final Judgment and the trial court's Findings of Fact and Conclusions of Law are printed in the Appendix at pages 53-54.

JURISDICTION

The judgment of the County Court was entered April 7, 1967. (A. 54). Notice of Appeal to the United States Supreme Court was filed in the County Court on June 15, 1967. (A. 59). The Jurisdictional Statement, Transcript and Statement of Facts were filed in the United States Supreme Court on July 21, 1967. Probable jurisdiction was noted on October 9, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (2), and is supported by *Largent v. Texas,* 318 U.S. 418 (1943), and *Robinson v. California,* 370 U.S. 660 (1962).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:

Eighth Amendment, United States Constitution:

> "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

Vernon's Penal Code, Art. 477, Vol. 1, p. 497 (1925):

> "Art. 477. Drunk in public place.
>
> Whoever shall get drunk or be found in a state

of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

QUESTION PRESENTED

The question presented by this appeal is:

> Whether the conviction of a chronic alcoholic for being in a state of intoxication in a public place violates the Eighteenth and Fourteenth Amendments to the United States Constitution.

STATEMENT

On December 19, 1966, appellant was arrested and charged with being found in a state of intoxication in a public place. (A. 6). He was tried, found guilty, and fined $20.00 on December 20, 1966, in the Corporation Court of the City of Austin, Texas. (Tr. 2). Appellant appealed the conviction to the County Court at Law No. 1 of Travis County, Texas, where, following a trial *de novo* on April 5, 1967, he was found guilty and fined $50.00. (A. 46).

Appellant's story is typical of the stories of many indigent Americans who are afflicted with the disease of chronic alcoholism. At the time of his trial he was 66 years old with a history of drinking dating back to 1925. (A. 34, 35). He estimated he has been arrested for being drunk approximately 100 times. (A. 36). In Travis County alone, the records reflect 73 arrests since 1949. (A. 50, R. 28).

Appellant drinks every day and gets drunk about once each week (A. 35). He earns an average of $12.00 a week working in a tavern shining shoes. (A. 34, 37). Instead of using his meager earnings to purchase gro-

ceries or support his family, he uses his $12.00 of weekly earnings to purchase more liquor. (A. 37). Indeed, the total fines imposed on appellant for being drunk in 1966 exceed 20% of his total earnings. He remembers at least two jobs he has lost because of his drinking problem and readily admits that he has no control of his drinking. (A. 38). In fact, he was again arrested for being drunk pending the appeal of this case from the Corporation Court to the County Court at Law. (A. 39). In short, appellant is an alcoholic who would like to be medically treated but is without sufficient financial resources to obtain such help. (A. 37). And given the ability to choose, he would not voluntarily appear in public in a state of intoxication. (A. 39).

Dr. David Wade, a national recognized psychiatrist, author and lecturer on alcoholism, testified on appellant's behalf. (A. 11). After examining and interviewing appellant, Dr. Wade diagnosed his condition as "chronic alcoholic." (A. 24). Dr. Wade stated that alcoholism is a disease which destroys the alcoholic's ability to refrain from constant, excessive consumption of alcohol. (A. 18). Dr. Wade further stated that once a person is afflicted with the disease of alcoholism, his appearance in public in a state of intoxication would not only be involuntary on his part, but is symptomatic of the disease of chronic alcoholism. (A. 19). Dr. Wade stated that appellant does not have the will power to resist the constant, excessive consumption of alcohol and that his appearance in public in a state of intoxication is involuntary. (A. 24).

Based upon the uncontradicted testimony presented on appellant's behalf, the trial judge entered the following Findings of Fact:

"1. That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.

2. That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.

3. That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." (A. 53).

By Motion to Quash the Complaint (A. 1), Motion for Judgment (A. 51) and Amended Motion for New Trial (A. 55), appellant unsuccessfully contended that his conviction for being in a state of intoxication in a public place was barred by the cruel and unusual punishment clause of the Eighth Amendment, as made applicable to the States by the Fourteenth Amendment. The trial judge rejected this contention and entered the following Conclusion of Law:

"1. The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code." (A. 53).

ARGUMENT

I. APPELLANT'S CONVICTION FOR PUBLIC INTOXICATION IS UNCONSTITUTIONAL.

The County Court at Law No. 1 of Travis County has held that the Eighth Amendment does not preclude the State of Texas from criminally punishing the in-

voluntary consequences of being afflicted with the disease of chronic alcoholism.

Appellant submits that any statute which criminally punishes an ill person for conduct over which he has no control is unconstitutional in violation of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. Appellant's contention is limited to the situation presented by this appeal, where the defendant is afflicted with the disease of chronic alcoholism which destroys his will power to resist the constant, excessive consumption of alcohol and his appearance in public in a state of intoxication is involuntary.

The history of public intoxication statutes, considered in light of medical advances which have been made in the treatment and care of chronic alcoholics, reflects the inability of the courts to deal with what is basically a medical problem. Criminal punishment for the involuntary consequences of a disease cannot withstand judicial scrutiny under the Eighth Amendment.

A. HISTORICAL BACKGROUND

Article 477, Texas Penal Code, *supra,* p. 3, is a classic example of the many public intoxication statutes in effect across the country. When applied to a chronic alcoholic, such a statute imposes criminal sanctions upon conduct which the individual has no ability to control. This traditional attitude of hostility toward alcoholism finds root as far back as biblical expressions condemning intoxication as being immoral. See, e.g. Leviticus 10:9; Proverbs 23:31-32. The Parliament of James I carried over the biblical concept that drunkenness was a moral offense in the English Intoxication Statute of 1606 declaring:

"Whereas the loathsome and odious Sin of Drunkenness is of late grown into common Use within this Realm, being the Root and Foundation of many other enormous Sins, as Bloodshed, Stabbing, Murder, Swearing, Fornication, Adultery, and such like, to the great Dishonour of God, and our Nation, the Overthrow of many good Arts and manual Trades, the Disabling of Divers Workmen, and the general Impoverishing of many good Subjects, abusively wasting the good Creatures of God . . ." 4 Jac. 1, c.5 (1606).

The English law provided for the drunk to be fined, or, if the drunk was without sufficient resources to pay his fine, he was placed in the stocks for six hours. 4 Jac. 1, c.5 (1606). Most of the public intoxication statutes in effect today continue to impose this form of punishment for drunkenness—fine and/or imprisonment[1]—with the result that the derelict chronic alcoholic invariably finds himself confined in a jail which is neither attuned to his medical needs nor properly equipped for his care.[2] This is largely the rule today in spite of the fact that responsible authorities have stated that alcoholism has perhaps the highest recovery potential of all major health problems in the United States today.[3]

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[1] See, e.g., Cal. Pen. Code §§ 647, 19; D.C. Code Ann. § 25-128 (a) (1961); Mich. Stat. Ann. § 28.365 (1962); N.C. Gen. Stat. §§ 14-335 (12) (Supp. 1965); Wisc. Stat. Ann. § 947.03 (1958).

[2] Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriate*, 139 (1958):

[3] "The best medical opinion before our committee was to the effect that thirty to fifty per cent of the chronic alcoholics could be helped if alcoholism were treated as a health problem rather than a crime." Rehabilitation of Alcoholics, Hearings before the Sub-Committee on Health, Education, and Recreation, of the House Committee on the District of Columbia, 93 Cong. Rec. 3357 (1947).

The medically defined characteristics of chronic alcoholism clearly reveal that a chronic alcoholic does not appear in public in a state of intoxication of his own volition. The medical concept of alcoholism as a disease has existed for over one hundred and sixty-three years. As early as 1804 Dr. Thomas Trotter stated:

> "In medical language, I consider drunkenness, strictly speaking, to be a disease; produced by a remote cause, and giving birth to actions and movements in the living body, that disorder the functions of health." Haggard & Jellinek, *Alcohol Explored* 142 (1954), quoting from Trotter, *An Essay, Medical, Philosophical and Clinical on Drunkenness,* 179 (2d. ed. 1804).

However, the traditional approach to drunkenness as a moral defect, and the prohibition movement which culminated in the Eighteenth Amendment to the Constitution, combined to submerge consideration of alcoholism as a public health problem.[4] One author suggests that another factor in the tardy presentation of alcoholism as a disease was the fear of the "alcoholic practice" label as well as the difficulty in diagnosing and treating the alcoholic.[5]

With the failure of the prohibition movement in this country came a surge in the medical, sociological and psychological study of the alcoholic. Today alcoholism is universally accepted as a disease which requires med-

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[4]See generally, Krout, The Origins of Prohibition (1925); Ullman, To Know the Difference 3-4 (1960).

[5]Lipscomb, *Epidemiological Methods in the Study of Alcoholism,* 49 Amer. J. of Public Health 327, 328 (1959).

ical attention for its proper treatment and care.[2] In 1947, for example, Congress declared that judges in the District of Columbia should take judicial notice that alcoholism is a disease. D.C. Code Ann. § 24-501 (1961 ed.)

In 1953, Texas enacted comprehensive legislation providing for the civil commitment of alcoholics, declaring:

> "... Alcoholism is hereby recognized as an illness and a public health problem affecting the general welfare and the economy of the State. Alcoholism is further recognized as an illness subject to treatment and abatement and the sufferer of alcoholism is recognized as one worthy of treatment and rehabilitation. The need for proper and sufficient facilities, programs and procedures within the State for the control and treatment of alcoholism is hereby recognized. It is hereby declared that the procedure for commitment of alcoholics as hereinafter provided for is not punitive but is a commital for treatment of an illness affecting not only the individual involved but the public welfare as well." Vernon's Texas Civil Statutes, Art. 5561c § 1 (1953).

In 1956, the American Medical Association House of Delegates for the first time formally recognized alcoholism as a medical problem and urged that alcoholics be admitted to general hospitals.[3] In 1966, the AMA reemphasized the need for medical facilities to

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[2] Cecil and Loeb, a Textbook of Medicine, 1625 (10th ed. 1959); Jellinek, The Disease Concept of Alcoholism, 41-44 (1960); Guttmacher and Weihofen, Psychiatry and the Law, 318-322 (1952 ed.). See also: Appendix A, Brief of Amici Curiae.

[3] *Hospitalization of Patients with Alcoholism*, 762 A.M.A.J. 750 (October 20, 1956).

treat alcoholics and requested the Joint Commission on Accreditation of Hospitals to assist them in implementing the 1956 statement. (A. 21). At the present time, the AMA and related organizations are actively involved in educating the public and physicians in the problems of alcoholism.*

Intrinsic in the disease concept of alcoholism is the fact that an alcoholic does not have the ability to control his drinking. The American Medical Association defines "alcoholic" as:

> "Those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning." (A. 15).

The National Council on Alcoholism defines a "chronic alcoholic" as:

> "A person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." National Institute of Mental Health, Dept. of Health, Education and Welfare, *Alcoholism,* Public Health Service Pub. No. 730 (1963).

Congress has defined a "chronic alcoholic" as:

> "The term 'chronic alcoholic' means any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol en-

*A.M.A., *Today's Health Guide* 459 (1965); Concerning Responsibility of Psychiatrists and other Physicians for Alcohol Problems (Feb. 1965); National Institute of Mental Health, United States Depart. of Health, Education and Welfare, *Alcoholism,* Public Health Service Pub. No. 730 (1963).

dangers the public morals, health, safety, or welfare." D.C. Code Ann. § 24-502 (1961 ed.).

The Texas Legislature has defined "alcoholic" as:

> "An 'alcoholic' means any person who chronically and habitually uses alcohol beverages to the extent that he has lost the power of self control with respect to the use of such beverages, or while chronically and habitually under the influence of alcoholic beverages endangers public morals, health, safety or welfare." Vernon's Texas Civil Statutes, Art. 5561c § 3(c) (1953).

Thus, an element common to every definition of a "chronic alcoholic" is his inability to control his use of alcohol. It is this element which many medical authorities conclude forms the basis for the disease concept of alcoholism.

> "The disease conception of alcohol addiction does not apply to the excessive drinking, but solely to the loss of control which occurs in only one group of alcoholics, and then only after many years of excessive drinking." Jellinek, *Phases of Alcohol Addiction, in Society, Culture and Drinking Patterns,* 357 (1962).

And it is this same characteristic of the disease, destruction of the alcoholic's will power to resist the constant, excessive consumption of alcohol, that forms the legal basis upon which appellant contends his public intoxication cannot be demeaned as criminal. To punish appellant—a chronic alcoholic—for publicly exhibiting a symptom of his disease is cruel and unusual punishment forbidden by the Eighth Amendment standards recognized by this Court.

B. THE EIGHTH AMENDMENT STANDARDS

From the decisions of the Supreme Court which have constued the Eighth Amendment, two basic principals have developed by which punishment asserted to be "cruel and unusual" are to be judged. First, is the principle that the substantive standards which give meaning to the Eighth Amendment are not "static" but are continually evolving with the progress of humanity. Second, the judicial inquiry in a particular case is focused on whether the punishment inflicted amounts to "barbarous," "inhumane" or "indecent" treatment.

As early as *Wilkerson v. Utah,* 99 U.S. 130 (1879), this Court recognized that boundaries could not be drawn beyond which the Eighth Amendment would not apply.

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; . . ." § 99 U.S. at 135-136.

The above passage was quoted in *In re Kemmler,* 136 U.S. 436, 447 (1890), immediately followed by the comment that "Punishments are cruel when they involve torture or a lingering death; . . ." However, in *Weems v. United States,* 217 U.S. 349 (1910), the Court was careful to point out that the statement quoted above from *In re Kemmler* "was not meant . . . to give a comprehensive definition of cruel and unusual punishment, but only to explain the application of the provision to the punishment of death." 217 U.S. at 370-371. After commenting on the history which gave birth to the Eighth Amendment, the Court concluded:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. . . ." 217 U.S. at 373.

In *Trop v. Dulles,* 356 U.S. 86 (1958), the Court placed the basis for the Eighth Amendment's guarantee against cruel and unusual punishment in proper posture. In the opinion for the majority, Mr. Chief Justice Warran stated:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." 356 U.S. at 100.

Commenting on the earlier holding in *Weems v. United States,* Chief Justice Warran reemphasized the scope of the Eighth Amendment in the following language:

> "The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*" 356 U.S. at 100-101. (Emphasis added).

History has shown that criminal law is "one of the most faithful mirrors of a given civilization, reflecting

the fundamental values on which the latter rests.'" In like manner, the decisions of the Supreme Court which have construed the Eighth Amendment reflect "the evolving standards of decency" which require that punishments inflicted be kept "within the limits of civilized standards."

That a form of punishment finds early vintage in the annals of history is irrelevant to the inquiry of whether that punishment is now considered "cruel and unusual." Mr. Justice Story concluded the prohibition was aimed at "atrocious conduct." 2 Story, *Commentaries on the Constitution of the United States,* § 1903 at 650 (5th ed. 1891). In Mr. Justice Field's well-known dissenting opinion in *O'Neil v. Vermont,* 144 U.S. 323, 364 (1892), he stated, "It is against the excessive severity of the punishment, as applied to the offenses for which it is inflicted, that the inhibition is directed." All authorities agree that such barbarisms as "burning at the stake, crucifixion, breaking on the wheel" are "within the constitutional prohibition." *In re Kemmler, supra,* at 446. However, the Supreme Court early concluded the framers of the constitution had recognized "there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." *Weems v. United States, supra,* at p. 372.

Other courts have construed the Eighth Amendment to prohibit any punishment that would "shock the sensibilities of men," "shock public sentiment and violate the judgment of reasonable men," or which "shocks a balanced sense of justice." *Jackson v. United States,* 102 Fed. 473, 488 (9th Cir. 1900); *Hayes v. United States,* 112 F.2d 417, 420 (10th Cir. 1940); *Gallego v.*

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*Donnelly, Goldstein & Schwartz, Criminal Law 524 (1962).

United States, 276 F.2d 914 (9th Cir. 1960). In *Weber v. Commonwealth,* 303 Ky. 56, 196 S.W.2d 465, 469 (1946), the Kentucky Supreme Court suggested the Eighth Amendment was intended to keep pace "with the progress of humanitarianism." In *Ex Parte Pickens,* 101 F.Supp. 285, 288 (D.C. Ala. 1951), the Court stated that "the Eighth Amendment is to be considered in the light of developing civilization," making it unnecessary "to speculate as to what might have been considered cruel and inhuman punishment in 1787."

More recently, in *Robinson v. California,* 370 U.S. 660 (1962), the Supreme Court reaffirmed that the prohibition against "cruel and unusual" punishment did not encompass merely broad "generalties of empty vagueness."[10] In *Robinson* the Court struck down a statute which made the "status" of narcotic addiction a criminal offense. Drawing upon "the light of contemporary human knowledge" the Court concluded that any law which made a criminal offense of suffering from a disease would be an infliction of cruel and unusual punishment. Mr. Justice Douglas, in his concurring opinion, stated that "The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man," and agreed that the same principle which prohibited the emboweling of a person alive also prohibited "imprisonment for being sick." He concluded, "Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." 370 U.S. at 676.

Appellant submits that if the basic concept under-

[10] *Francis v. Resweber,* 329 U.S. 459 (1947), Mr. Justice Frankfurter's concurring opinion, at page 466.

lying the Eight Amendment is nothing less than the dignity of man, then, in the light of contemporary human knowledge, punishment of a chronic alcoholic for publicly exhibiting a symptom of his illness cannot bear scrutiny under the Eighth Amendment. Appellant does not question the form of punishment, but denies the authority of the State of Texas to punish him at all.

C. THE *DRIVER* AND *EASTER* CASES[11]

The Court of Appeals for the Fourth Circuit and four of the eight Judges of the Court of Appeals for the District of Columbia Circuit have held it is cruel and unusual punishment to convict a chronic alcoholic for being intoxicated in a public place.

In *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), the court squarely sustained the contention now presented to this Court. In *Driver* the court stated:

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[11]The social and legal importance of the *Driver* and *Easter* decisions have been recognized with a wealth of commentary. See: Judice, *Public Intoxication*, 30 Tex. Bar J. 341 (1967); Murtagh, *Arrests for Public Intoxication*, 35 Fordham L. Rev. 1, 7-13 (1966); New York State Bar Ass'n. Committee on Public Health, *Report on Alcoholism* (Dec. 31, 1966); Note, *Alcoholism, Public Intoxication and the Law*, 2 Colum. J. of L. & Soc. Prob. 109 (1966); Note, *Cruel and Unusual Punishment — Alcoholism as a Defense to a Charge of Public Intoxication*, 41 Tulane L. Rev. 140 (1966); Note, 1966 Duke L. J. 545 (1966); Comment, 4 Houston L. Rev. 276 (1966); Comment, 18 S.C. L. Rev. 504 (1966); Note, 12 Wayne L. Rev. 879 (1966); Note, 52 Cornell L. Q. 470 (1967); Note, 27 La. L. Rev. 340 (1967); 33 Brooklyn L. Rev. 324 (1967); 8 Ariz. L. Rev. 351 (1967); 12 S. Dak. L. Rev. 142 (1967); 46 B.U. L. Rev. 409 (1966); 15 Catholic U. L. Rev. 259 (1966); 54 Geo. L. J. 1422 (1966); 55 Ky. L. J. 201 (1966); 44 N.C. L. Rev. 818 (1966); 3 Tulsa L. J. 175 (1966); 11 Vill. L. Rev. 861 (1966); 23 Wash. & Lee L. Rev. 402 (1966); 7 Wm. & Mary L. Rev. 394 (1966); 13 Howard L. J. 203 (1967); 19 Ala. L. Rev. 183 (1966); and 2 Ga. St. Bar J. 239 (1965).

"This addiction—chronic alcoholism—is now almost universally accepted medically as a disease. The symptoms, as already noted, may appear as 'disorder of behavior.' Obviously, this includes appearances in public, as here, unwilled and ungovernable by the victim. When that is the conduct for which he is criminally accused, there can be no judgment of criminal conviction passed upon him. To do so would affront the Eighth Amendment, as cruel and unusual punishment in branding him a criminal, irrespective of consequent detention or fine." 356 F.2d at 764.

The court concluded its analysis that a State could not constitutionally inflict punishment for an illness as follows:

"*Robinson v. State of California, supra,* 370 U.S. 660, 82 S.Ct. 1417 (1962), sustains, if not commands, the view we take. While occupied only with a State statute declaring drug addiction a misdemeanor, the Court in the concurrences and dissents, as well as in the majority opinion, enunciated a doctrine encompassing the present case. The California statute criminally punished a 'status'—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication. In declaring the former violative of the Eighth Amendment, we think pari ratione, the *Robinson* decision condemns the North Carolina law when applied to one in the circumstances of appellant Driver. All of the opinions recognize the inefficacy of such a statute when it is enforced to make involuntary deportment a crime." 356 F.2d at 764-765.

In *Easter v. District of Columbia,* 361 F.2d 50 (D.C. Cir. 1966), the Court of Appeals sitting en banc, held that a chronic alcoholic cannot be convicted for being

drunk in public because his disease has destroyed his capacity to remain sober. Four of the judges rested their holding primarily on common law grounds, relying upon a 1947 Congressional Act which defined "chronic alcoholic" as a person who, *inter alia,* "has lost the power of self control with respect to the use" of alcoholic beverages." However, four judges adopted a broader ground of decision:

> "Our decision would be the same were we without the guidance furnished by the Act of 1947. One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public. . . ." 361 F.2d at 53.

The court, discussing the applicability of *Robinson v. California, supra,* noted:

> ". . . Since, as we have seen public intoxication of a chronic alcoholic is not a crime, to convict one of it as though it were would also be cruel and unusual punishment. . . ." 361 F.2d at 54-55.

Relying on the precedential authority of *Driver, supra,* the court held:

> ". . . that the public intoxication of a chronic alcoholic lacks the essential element of criminality; and to convict such a person of that crime would also offend the Eighth Amendment." 361 F.2d at 55.

The statutes involved in the *Driver* and *Easter* cases are substantially indistinguishable from Art. 477, Texas Penal Code. The conduct prohibited was the same: being intoxicated in a public place. Surely the law cannot discriminately say public intoxication is symptomatic of a disease in one part of the country

[11] D.C. Code Ann. § 24-502 (1961 ed.).

but a crime in another. If the Eighth Amendment protects chronic alcoholics against conviction for public intoxication in the Fourth and District of Columbia Circuits; so also must it reach chronic alcoholics in Texas.

The expert medical testimony of Dr. David Wade, unrebutted by the State, proved that appellant's "appearance in public in a state of intoxication" was an "involuntary" act. (A. 19, 24). Judge Dellana so found as a matter of fact. (A. 53). However, Judge Dellana erroneously concluded:

> "The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code." (A. 53).

Presumably, the theory behind treating appellant as a criminal is the same which calls for punishment of any criminal conduct—retribution, deterrence and rehabilitation. Once the fact that chronic alcoholism is a disease is accepted, the theory of retribution—incarcerating the offender for the wrong he has committed against society—is totally unacceptable. Our morality does not permit us to punish for illness.

The justification for deterrence, in these circumstances, is specious at best. We need look no further than the record of appellant, 73 reported arrests for public drunkenness, to see the lack of any deterrent effect from the incarceration of chronic alcoholics. "The results of our investigation negate completely the assumption that incarceration acts as a deterrent

to the chronic public inebriate." Pittman & Gordon, *supra*, footnote 2.

The objective of rehabilitation is equally inapplicable. Clearly, the criminal law does not contribute to the solution of this medical problem. This has been recognized as recently as February, 1967, when the President's Commission on Law Enforcement and Administration of Justice concluded:

> "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender." *U.S. Crime Commission Report* at 235. (1967).

The President's Commission on Crime in the District of Columbia reported that in 1965, 44,218 arrests were made in the District of Columbia for violations of the public intoxication law. The Commission concluded:

> "These arrests reflect the essential inability of the police, courts and prisons to deal effectively with what is basically a major health problem in the District and throughout the United States—chronic alcoholism." *D.C. Crime Commission Report* at 474. (1967).
>
> "The practice of dealing with destitute public inebriates as criminals has proven to be expensive, burdensome and futile. . . .
>
> "Moreover, criminal procedures did not serve as a deterrent. . . . The resort to criminal sanctions has completely failed. Periodic commitments to a penal institution were a misguided solution, failing to meet either the alcoholic's immediate health needs or the more basic problems underlying his illness. . . ." Id. at 485-486.
>
> "For these unfortunate people, simple humanity demands that we stop treating them as criminals

and provide voluntary supportive service and residential facilities so that they can survive in a decent manner." Id at 501.

The Citizens' Advisory Committee to the California Attorney General on Crime Prevention has concluded:

> "The thousands of alcoholics who spend most of their lives 'wearing out the jails' of their home counties are more than a nuisance to the public, more than a heavy burden on the taxpayer, more than a menace to health. They are symbols of public indifference, of governmental ineptitude.
>
> "Our method of dealing with them—the 'street cleaning operation' by which they are swept out of the doorways and alleys and gutters of our Skid Rows, to be dumped into 'drunk tanks' scarcely less filthy than the gutters, their brief contact with the court, their meaningless run around through revolving door jails, their stumbling return to Skid Row, the failure to provide humane, scientific, sustained care and treatment with effective follow-up by clinics and social agencies after their release—all this constitutes a violation of basic principles of common sense and common humanity." quoted in MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime,* 9 Crime & Delinquency 15, 17-18 1963).

The medical profession has repeatedly decried the punishment being imposed on people afflicted with the disease of chronic alcoholism." The former Chairman of the American Medical Association's Committee on Alcoholism, Dr. Marvin Block, has warned that "one cannot legislate against a disease," and emphasized

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"See the myriad of authorities quoted in *Easter v. District of Columbia,* 361 F.2d at 56-60.

"the importance of regarding alcoholism as an illness rather than a violation of the law." Block, *Alcoholism: Its Facets and Phases* 60, 283-84 (1965).

If the substantive law of the Eighth Amendment is to be drawn from "the evolving standards of decency that mark the progress of a maturing society," surely appellant's conviction, for conduct a disease has usurped his ability to control, constitutes cruel and unusual punishment "in an enlightened democracy such as ours."

II. APPELLANT'S CONVICTION FOR EXHIBITING A SYMPTOM OF HIS DISEASE IS UNCONSTITUTIONAL.

In *Robinson v. California, supra,* this Court reversed a conviction under a California statute making it a crime to be addicted to narcotics. In striking down the statute as being unconstitutional on its face, the Court stated that "in the light of contemporary human knowledge," it is cruel and unusual punishment for a state to punish illnesses and diseases.

Appellant does not here contend that Article 477, Texas Penal Code, *supra,* p. 3, is unconstitutional on its face. It may properly be applied to persons unafflicted with the disease of chronic alcoholism. In the words of Judge Bryan in the *Driver* case, "Hence we exclude the merely excessive—steady or spree—voluntary drinker.'"[14] Appellant does contend, however, that Article 477, when applied to an unpretending chronic alcoholic, is unconstitutional in that application. And the fact that Article 477 punishes a symptom of the dis-

[14] 356 F.2d at 764.

ease of chronic alcoholism—public intoxication—rather than the disease itself, affords no basis for distinguishing *Robinson.*

Prior to *Robinson,* the Eighth Amendment had been regarded as a restriction on the power of the legislature in two areas: it prohibited punishment that was inherently cruel because of its inhuman or barbarous nature, and it prohibited punishment that was grossly disproportionate to the offense for which it was imposed. In *Robinson,* the Court held that the Eighth Amendment restricts not only the state's power to prescribe punishment but also limits the power of the state to define specific conduct as being criminal.

> ". . . Rather we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' . . ." 370 U.S. at 666.

In noting the limits which the Eight Amendment places on the State's power to define crime, the Court stated:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S. at 666.

Mr. Justice Douglas, in his concurring opinion, effectively drew an analogy between drug addiction and the evils society once practiced on the insane, concluding:

> "... We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U.S. at 678.

There can be no question that if Article 477 provided that "a chronic alcoholic found in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars," the statute would be struck down as unconstitutional under *Robinson. No tenable basis exists for distinguishing this hypothetical provision from Article 477 as applied to appellant.*

In *Robinson* the Court stated that "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Would not also "one day in prison . . . be a cruel and unusual punishment for the 'crime' of" sneezing in public? It defies logic to say the Eighth Amendment prohibits punishing the status of being afflicted with a disease (chronic alcoholism) yet does not prohibit punishing the involuntary symptoms of a disease (public intoxication).

The Court of Appeals in *Driver v. Hinnant, supra,* recognized that it would violate the Eighth Amendment to punish a chronic alcoholic for those acts "which are

compulsive as symptomatic of the disease.'"[15] The Court summarized its holding by stating:

> "The upshot of our decision is that the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease. . . ." 356 F.2d at 765.

In this case the trial judge found as fact that a chronic alcoholic cannot "resist the constant, excessive consumption of alcohol" and that his appearance in public is not "by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." Appellant's record of 73 arrests in Travis County alone punctuates the fact that habitual and repetitive public intoxication is the basic symptom of chronic alcoholism. Accepting this obvious truism, the Court of Appeals for the Seventh Circuit recently in *Sweeney v. United States,* 353 F.2d 10 (7th Cir. 1965), indicated that a chronic alcoholic could not be required to refrain from drinking as a condition of probation. In that case the District Court had suspended Sweeney's sentence on a Dyer Act conviction and placed him on probation with the condition he "refrain from the use of alcoholic beverages in any form, and . . . support his children to the best of his ability." Sweeney violated the condition, was arrested and began serving his original sentence. With regard to Sweeney's contention that his probation was revoked unjustly, the Court stated:

> ". . . It appears from the record that when probation was granted, the district court knew petitioner's history of chronic alcoholism, and had indications of its pathological nature. We think consequently the probation condition under the facts

[15] 356 F.2d at 764.

of this case, would be unreasonable' as impossible if psychiatric or other expert testimony was to establish that petitioner's alcoholism has destroyed his power of volition and prevented his compliance with the condition." 353 F.2d at 11.

In footnote 2, indicated in the above quotation, the Court cited *Robinson* and said:

> ". . . the Supreme Court, in striking down a California statute which, as construed, made the 'status' of narcotic addition a criminal offense, illustrated why, on the record before us, we think the probation condition would be unreasonable: . . ." 353 F.2d at 11.

It is no less unreasonable to say that a state can not punish a person for having a disease but can punish him for involuntary conduct symptomatic of his disease.

In the trial court the State apparently sought to establish their case against appellant by establishing that "at the time the first drink was taken" appellant would "know the difference between right and wrong and would be able to know and appreciate the consequences of his taking a further drink." (A. 27; 42, 43). The State's approach was based on Article 36 of the Texas Penal Code which provides that *voluntary* intoxication is no defense to a criminal charge. The first paragraph of Article 36 reads as follows:

> "Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, intoxicating liquor, or narcotics, or a combination thereof, shall constitute any excuse for the commission of crime. Evidence of temporary insanity produced, however, by such use of ardent spirits, intoxicating liquor or narcotics, or a

combination thereof, may be introduced by the defendant in mitigation of the penalty attached to the offense for which he is being tried."

Appellant does not question the authority of Article 36. Appellant says that Article 36 is inapplicable to this case because the trial court found as fact that a chronic alcoholic does not have the ability to "resist the constant, excessive consumption of alcohol." Dr. Wade was quick to point this out when he stated that not only is the compulsion to take the initial drink "an exceedingly strong influence," but that after the initial drink, appellant's appearance in public in a state of intoxication is "because he has an uncontrollable compulsion to drink." (A. 24, 25, 26). Consequently, even though the origin of appellant's alcoholism may have been a voluntary first drink, this does not mean that his subsequent drinking is voluntary.

This same "original sin" contention was advanced, and rejected, in *Easter v. District of Columbia:*

> "... [c]hronic alcoholism resulting in public intoxication cannot be held to be criminal on the theory that before the sickness became chronic there was at some earlier period a voluntary act or series of acts which led to the chronic condition. A sick person is a sick person though he expose himself to contagion and a person who at one time may have been voluntarily intoxicated but has become a chronic alcoholic and therefore is unable to control his use of alcoholic beverages is not to be considered voluntarily intoxicated." 361 F.2d at 53.

Dr. Wade testified that "the individual who is afflicted with this disease has a compulsion to drink and he is unable to defy this compulsion." (A. 17). Recogni-

tion was also given to this principle in *Driver v. Hinnant:*

> "The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease." 356 F.2d at 764.

It is interesting to note that in *Robinson* the court cited copious authority to support their conclusion that narcotics addiction "may be contracted innocently or involuntarily." (370 U.S. at 667). Rejection of this "original sin" approach is even more compelling in the case of a chronic alcoholic. While non-medical use of narcotics is illegal throughout the United States, consumption of alcohol is, with certain restrictions, legal throughout this country. And, while a narcotics user may be a social outcast, the consumption of alcohol is often considered a social asset. Consequently, a person can become a chronic alcoholic without violating any law but only rarely does a narcotic user become addicted without doing so.

Where, as in this case, conduct cannot be controlled, there is no tenable reason for punishment. Neither deterrence nor rehabilitation are served. As stated by Mr. Justice Douglas in *Robinson,* "This prosecution has no relationship to the curing of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it." (370 U.S. at 677-678).

The Fourth and District of Columbia Circuit Courts have heeded the Supreme Court's prophecy in *Robinson* and repudiated the inhuman practice of punishing the involuntary conduct of a chronic alcoholic.

> "Traditionally, we have tried to meet the problem of alcoholism by penal law. But there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the laws against drunkenness.'"[10]

This futility was recently commented on by John M. Murtaugh, Chief Administrative Judge, New York City Criminal Court:

> "There is no moral justification for the present program of wholesale arrests of drunken derelicts. We will neither solve nor ameliorate the skid row problem by more vigorous police enforcement or sterner justice. The only function of a penal approach is to keep depravity from becoming too assertively public.
>
> "Once we appreciate these almost self-evident truths, we must realize how farcical our primitive justice is and has been over the years. Today we recoil at the manner in which past generations used burning and whipping to curb crime. Is it not likely that future generations will read of our imprisonment of drunken derelicts with a similar sense of shock and outrage?" Murtagh, *Arrests for Public Intoxication,* 35 Ford.L.Rev. 14 (1966).

In the "light of contemporary human knowledge," under what "standards of decency that mark the progress of a maturing society" can appellant's conviction for public intoxication be considered a "civilized" practice? History has shown that such standards, if ever they existed, have long since been buried by medical advances in the diagnosis, treatment and care of chronic alcoholism. As Mr. Justice Holmes once wrote:

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[10]Guttmacher & Weihofen, *Psychiatry & The Law* 319 (1952).

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law,* 10 Harv. L.Rev. 457, 469 (1897).

Appellant submits that his conviction for public intoxication denies "the dignity of man" and is unconstitutional in violation of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.

CONCLUSION

Appellant prays the judgment and sentence of the County Court at Law No. 1 of Travis County, Texas, be reversed and that costs be taxed against appellee.

Respectfully submitted,

BYRD, DAVIS, EISENBERG & CLARK

DON L. DAVIS

TOM H. DAVIS

214 Austin National Bank Bldg.

Austin, Texas 78701

By_____

Attorneys for Appellant

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